

- (1) Did claimant's cardiomyopathy develop due to or was it aggravated or accelerated by his employment?
- (2) Was claimant's cardiomyopathy caused by unusual exertion within the meaning of K.S.A. 44-501(e)?
- (3) Did the emotional stress claimed by claimant in his employment constitute an external force sufficient to constitute an accidental injury arising out of and in the course of his employment?
- (4) Was the virus which infected claimant an accidental injury arising out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein and for preliminary hearing purposes, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant, a long-term employee with respondent, worked as a pattern maker and drafter, which required that he spend a substantial portion of his time sitting at a computer. However, claimant's work duties also required that he troubleshoot, which necessitated that he regularly walk through the facility, which was described as being over a block long and not air-conditioned. Along with walking through the plant, claimant was also required to help handle materials, assisting with the layout and makeup of what was described as "first articles." This regularly necessitated some lifting in the shop.

During the one to two weeks prior to May 7, 2002, claimant developed symptoms consistent with an upper respiratory infection. He was ultimately diagnosed with Coxsackie B4 virus, a viral infection, which affected claimant's heart.

Claimant's history is significant in that he suffered from a congenital condition inherited from his mother described as Marfan's syndrome. This is a congenital disorder of connective tissue characterized, in part, by cardiovascular abnormalities (commonly dilatation of the ascending aorta).¹

Claimant's Marfan's syndrome necessitated that he undergo aortic valve and mitral valve replacements with an ascending aortic graft in 1998. At that time, claimant's employment with respondent was the same as on May 7, 2002. Claimant did miss a substantial amount of work as a result of this surgery. Claimant returned to work after the surgery at his regular job tasks.

As noted above, during the two weeks prior to May 7, 2002, claimant began experiencing additional symptoms of fatigue. Claimant's condition worsened to the point where he could not walk a half a block or ascend a flight of stairs without experiencing shortness of breath. Claimant was also experiencing occasional chest tightness with exertion.

May 7, 2002 was claimant's last day of employment with respondent. On that date, he was fatigued to the point where he was no longer able to work. He sought medical treatment through his primary care physician, Edward Cusick, D.O., who referred him to Michelle R. Brown, M.D., at Kansas Cardiology Consultants. Dr. Brown admitted claimant to Via Christi Regional Medical Center in Wichita, Kansas, where he was examined by

¹See *Dorland's Illustrated Medical Dictionary* 1634 (28th ed. 1994).

Thomas H. Estep, M.D., on May 10, 2002. Dr. Estep diagnosed Marfan's syndrome with severe ventricular dysfunction and congestive heart failure. Dr. Estep noted that claimant was a smoker and recommended that claimant cease all smoking activities immediately.

Claimant's past history included the previously described surgical procedures. His social history included stress in his family life which is not fully described in the record. There is no mention in Dr. Estep's medical reports of any work involvement or work-related stress.

Claimant testified at preliminary hearing that his work duties had increased during the two weeks prior to May 7, 2002. He alleged his work was more taxing and his supervisor was placing greater stress on him, in part, due to his ongoing health concerns. Claimant's supervisor, Tim Pence, denied placing any additional stress on claimant. In fact, Mr. Pence acknowledged that claimant did not appear well and recommended that he go to his doctor. While claimant alleged that the work responsibilities during that two-week period were greater, Mr. Pence denied that the work duties and responsibilities of that time period were any greater than normal. He testified that claimant's normal job requirements necessitated that he walk through the plant occasionally in order to help set up first articles. This did require tugging and pulling on products while laying out and making up first articles.

There is indication in the record that claimant had experienced some stress resulting from several late arrivals he had on his attendance record. Claimant's attendance problems deteriorated to the point where on August 23, 2001, Mr. Pence provided him with an e-mail requesting that he improve his tardiness. There is no indication in the e-mail that there was any threat to claimant's employment.

Claimant testified that Mr. Pence had told him either he should do the job or they would find someone else. Mr. Pence vehemently denies making this statement. Mr. Pence went on to testify that he made no threat to claimant's job.

The Administrative Law Judge found that claimant's cardiomyopathy was not caused by unusual exertion on the job. The Administrative Law Judge went on to find that both the virus and the emotional stress were outside external forces which she found to be causative factors in producing claimant's heart injury. The Administrative Law Judge, however, found that the emotional stress experienced by claimant did not rise to the level of substantial or external force sufficient to cause claimant's heart condition. Additionally, the virus which infected claimant was not an extreme or substantial force that arose from claimant's work.

Claimant's treating physician, Dr. Brown, stated in her report of June 6, 2002, that claimant had been subjected to emotional stress caused by being required to continue working while he was infected with a Coxsackie B4 virus. She also went on to state that

had claimant been at bed rest, rather than at work, his condition would not have been as significant as it ultimately developed. Her reasoning was based on claimant's statements to her that he had been required to work with threats of job loss should he take sick leave.

Dr. Brown found it significant that claimant was forced to walk in a building which was not air-conditioned and was also forced to do lifting, both which were a part of claimant's normal job responsibility.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.²

K.S.A. 44-501(e) states:

Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.

The Kansas Supreme Court, in *Makalous*,³ addressed the language contained in K.S.A. 44-501 dealing with the "usual vs. unusual" dispute contained in the so-called "heart amendment" to K.S.A. 44-501, stating:

What is usual exertion, usual work and regular employment as those terms are used in the 1967 amendment to K.S.A. (now 1972 Supplement) 44-501 will generally depend on a number of surrounding facts and circumstances, among which the daily activities of the workman may be one, but only one, among many factors.

Whether the exertion of the work necessary to precipitate a disability was more than the workman's usual work in the course of his regular employment presents a question of fact to be determined by the trial court.⁴

In this instance, the Administrative Law Judge found, and the Board agrees, that claimant's cardiomyopathy was not caused by unusual exertion within the meaning of K.S.A. 44-501(e). While claimant contends that his labors leading up to May 7, 2002, were substantially increased, the testimony of claimant's supervisor, Mr. Pence, contradicts that allegation. The labors described by claimant were the same labors which claimant

² See K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

³ *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 565 P.2d 254 (1977)

⁴ *Makalous*, at 481.

regularly performed in his job. The Board, therefore, finds that the exertion required in claimant's job was no more than claimant's usual work in the course of his regular employment.

The Supreme Court, in *Makalous*, went on to note, however, that where claimant's disability is the product of some external force or agency, and not of the exertion of claimant's work, the heart amendment has no applicability.

Where exertion is not the agency which produces the workman's disability, the usual vs. unusual exertion test of the heart amendment is irrelevant. (213 Kan. 262, syl. 2, 3 and 4.) Citing *Dial v. C. V. Dome Co.*, 213 Kan. 262, 515 P.2d 1046 (1973).⁵

In *Dial*, the Supreme Court found that an external force other than exertion, when being the factor which precipitates a cerebrovascular accident, could result in the disability being compensable as a result of an "external force."

In *Dial*, the medical testimony verified that it was the heat that claimant was subjected to which led to the disability. There was no mention in the medical evidence of exertion as a causative factor. The court, in *Dial*, found that the evidence indicated the progressive enclosure of the mezzanine on which claimant worked caused "progressively greater heat." The court found that the cardiovascular injury in *Dial* did not bring the heart amendment into play because the agency which "precipitated" the disability was not the exertion of his work, but rather the external force, in that instance the extreme heat. The court, in *Dial*, stated:

Where the disability is the product of some external force or agency, and not the exertion of the claimant's work, the heart amendment has no applicability. In such a case, where exertion is not the agency "necessary to precipitate the disability," the usual vs. unusual exertion test applied in our previous heart amendment cases is irrelevant. Instead, the customary standards are to be applied in determining whether the injury was accidental, and whether it arose out of and in the course of a workman's employment.⁶

The court in *Makalous*, after analogizing *Dial*, found that heat and cold in working environments are recognized as external forces which can cause injury. In *Makalous*, it was the extreme cold which claimant was subjected to which precipitated his heart attack.

⁵ *Makalous*, at 482.

⁶ *Dial*, at 268.

In this instance, claimant alleges the un-air-conditioned building, which he was forced to walk through and work in, led to his heart condition. While it is noted Dr. Brown mentioned the lack of air-conditioning in the building, the record is void of any indication as to what extremes this building may have subjected claimant to. There is no indication as to how hot the building may have been. It is difficult to imagine extreme heat on May 7, 2002, absent some weather information to indicate that that was an unusually hot day for the first week of May. The Board finds claimant has failed to prove that the lack of air-conditioning in the building subjected him to an external force in the form of extreme heat, which would allow a finding that claimant's heart attack resulted from an accidental injury arising out of and in the course of his employment.

Additionally, claimant contends that the virus in some way is related to his employment. However, there is no medical evidence in the record to connect claimant's Cocksackie B4 virus with his employment. There is, however, medical evidence to show that the virus had a direct effect on claimant's heart condition, with the ultimate result being a possible future heart transplant.

The Board finds that claimant has not proven the virus was in any way related to his employment with respondent.

The Board next must deal with claimant's allegation that the emotional stress he was placed under in some way constitutes an external force sufficient to lead to his heart condition.

The Board dealt with the issue involving emotional stress in *Mudd*.⁷

In *Mudd*, the Board reviewed the Kansas Supreme Court's decision in *Suhm*.⁸ In *Suhm*, the Kansas Supreme Court had the opportunity to consider whether emotional stress constituted an external force or an exception to the heart amendment contained in K.S.A. 44-501. The court held that medical testimony failed to establish that the alleged emotional stress was the external force or agency which precipitated claimant's heart attack. The Board went on to state that by implication it appeared the court had determined that stress may constitute an external force.

Here, claimant has alleged emotional stress due to the pressure placed upon him by respondent's supervisor, Mr. Pence, regarding claimant performing the work or they would "find someone else." Mr. Pence vehemently denied these allegations by claimant and, in fact, instructed claimant to go see a doctor. Additionally, when claimant suffered

⁷ *Mudd v. Neosho Memorial Hospital*, No. 253,523, 2002 WL 1340533 (Kan. WCAB May 22, 2002).

⁸ *Suhm v. Volks Homes, Inc.*, 219 Kan. 800, 549 P.2d 944 (1976).

the medical problems in 1998, respondent not only allowed claimant off work, but returned him to his regular employment after the surgery and recovery period necessitated by his Marfan's syndrome. The Board, therefore, finds that claimant has not proven by a preponderance of the credible evidence that the alleged emotional stress placed upon him was sufficient to constitute an external force or agency which precipitated his heart problems.

The Board finds that the Order of the Administrative Law Judge denying claimant benefits in this matter should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the August 5, 2002 Order of Administrative Law Judge Nelsonna Potts Barnes should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2002.

BOARD MEMBER

c: Terry J. Torline, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation